DOCUMENT RESUME

ED 238 187 EA 016 286

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TITLE Disciplining Handicapped Students.
INSTITUTION Oregon School Study Council, Eugene.
PUB DATE Nov 83
NOTE 39p.
AVAILABLE FROM Publications, Oregon School Study Council, University of Oregon, 1787 Agate Street, Eugene, OR 97403 ($4.00; quantity discounts).
PUB TYPE Information Analyses (070) -- Collected Works - Serials (022)
JOURNAL CIT OSSC Bulletin; v27 n3 Nov 1983

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Behavior Problems; Court Litigation; *Disabilities; *Discipline Policy; Due Process; Elementary Secondary Education; Expulsion; Federal Legislation; *Legal Responsibility; Public Schools; Special Education; State Legislation; *Student Rights; Suspension
IDENTIFIERS *Education for All Handicapped Children Act; *Oregon; Rehabilitation Act 1973 (Section 504)

ABSTRACT

After a review of the legal foundations of school governance and specific protection offered handicapped students by federal legislation, this report focuses on Oregon regulations and practices and outlines recommendations for appropriate disciplinary procedures for students categorized as handicapped. Since the Education for All Handicapped Children Act of 1975 precludes changing a handicapped student's educational placement without due process and Section 504 of the Rehabilitation Act of 1973 prohibits discrimination solely by reason of handicap, the absence of clear federal or state guidelines renders suspension and expulsion of handicapped children legally problematical. Although litigation has not yet resulted, experts observe that Oregon public school officials often do not know and observe legal procedures for disciplining handicapped students, failing, for example, to determine whether a child's problem behavior is related directly to the handicap. Concluding the discussion are suggested guidelines for disciplining handicapped students, including exercising caution in the use of suspension, determining whether a revised individualized education program (IEP) would be more appropriate for a child with recurrent behavior problems, convening the multidisciplinary team to consider further assessment, continuously providing alternative instructional services in the case of repeated suspension or expulsion, and calling for a new IEP before expulsion. (MJL)

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Vol. 27, No. 3

OSSC BULLETIN

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ISSN 0095-6694

Individual Copy $4.00

Discount of 10% for 10 or more copies

Preface

This Bulletin served as the basis for a presentation by the author at the Oregon Small Schools Association annual Small Schools Conference at Western Oregon State College in Monmouth, in June 1983. It is an extension of results from a statewide needs assessment of current issues in special education conducted by the Oregon Department of Education. Teachers and school administrators throughout the state reported continuing interest in current interpretations of discipline policies and practices with handicapped students. Research funding was provided through the educational administration component of the College of Education's Dean's Grant at the University of Oregon.

The author, James Hockstaff, has worked as a teacher, administrator, and consultant in the field of special education for over thirteen years in California, Missouri, Alaska, Hawaii, and Oregon. Most recently he has served as the director of the Engelmann-Becker Learning Center in Eugene and is a doctoral candidate in the College of Education, Division of Educational Policy and Management.

Philip K. Piele

Executive Secretary

Contents

Preface iii

Introduction 1

Legal and Historical Foundations 3

- In Loco Parentis 4
- Student Due Process Rights 5
- Case Law Review 9
- Absence of Clear Federal Guidelines 17

Disciplinary Practices in Oregon 20

- Oregon Statutes and Administrative Rules 20
- The Advocacy Center's View: A Serious Problem 23
- Example of One School District 25
- Guidance on Relationship between Behavior and Handicap . . . 27
- Suggested Guidelines 28

Conclusion 30

References 31

Interviews 33

Introduction

Over the past fifteen years, rights afforded handicapped students have increased dramatically, to the frequent dismay of school authorities who previously enjoyed broader discretionary latitude in the conduct of all internal school affairs. Today, federal and state legislation seeking to protect handicapped students and their parents, a federal judiciary willing to apply Constitutional rights to the daily affairs of school operations, and an increasingly litigious citizenry combine to pose a potential threat to school personnel who fail to apprise themselves of current legal trends.

The use of disciplinary procedures, especially in the case of handicapped students, is among the most difficult problems facing public schools today (Gallup 1982, p. 44). Handicapped students often require more frequent disciplinary action. The stigma of being different is, in itself, often sufficient to motivate handicapped students to act out their frustrations in disruptive and sometimes violent ways. School officials usually deal with these disruptions in stereotypical fashion, employing a limited repertoire of responses consisting largely of corporal punishment, suspension, and expulsion. This potentially troublesome state of affairs is one that deserves careful consideration.

In these pages, I will briefly describe the formal and informal bases of school governance and control. I will describe the gradual decline of the "in loco parentis" doctrine by summarizing recent judicial affirmation of Constitutional protection of students in disciplinary actions. I will discuss federal legislation that provides additional protection to handicapped students, and I will summarize the

cases that have been heard to date on issues arising from disciplinary actions taken against handicapped students. Finally, I will report the viewpoints of some of Oregon's leading special educators and experts in special education law on the issue of appropriate disciplinary procedures for students categorized as handicapped under Oregon law.

Legal and Historical Foundations

Unlike the Congress of the United States, which possesses specific powers delegated to it by the Constitution, state legislatures possess plenary powers. That is, they may pass any act that is not forbidden either by state or federal constitutional provisions. Courts have consistently upheld the sovereignty of states to establish, maintain, regulate, and control the functioning of both private and public schools (Alexander 1980). Through state constitutional and statutory provisions, authority to operate public schools has been delegated to local districts. Broad discretionary powers are vested in local boards to hire, fire, and discipline personnel, purchase and maintain property, levy taxes, and promulgate and enforce various regulations. Regulations usually include rules on discipline and punishment of students, as well as on suspension and expulsion procedures.

A board's discretionary power is limited only by the requirements and restrictions of law. Generally speaking, courts will not interfere with a board's exercise of discretion, even when the judgment is unwise, except where the board's action "violates the law, abuses authority, or is an ultra vires act" (Alexander 1980, p. 119). In spite of the broad powers enjoyed by local and state school authorities, their prerogatives are not absolute. School officials are required to act within the scope of reasonable rules and regulations. Traditionally, courts have given wide discretion to schools in the promulgation of policies and regulations governing student conduct.

In Loco Parentis

The broad discretionary authority of school officials to discipline and control students entrusted to their care historically rests on a tradition originating beyond our shores in 18th century English common law. The doctrine of "in loco parentis" (in the place of the parent) is described as the delegation of parental authority "to the tutor or school master of his child; who is then 'in loco parentis', and has such portion of the power of the parent committed to his charge, viz. that restraint and correction, as may be necessary to answer the purpose for which he is employed" (Sharswood 1871, p. 452). This doctrine has ligitimized the power of teachers and other school officials, who, in the absence of formal school board rules, may require students to "abide by all reasonable commands and may inflict reasonable corporal punishment to enforce compliance" (Alexander 1980, p. 691). Courts have, in fact, sanctioned the practice of corporal punishment for centuries and continue to do so today (Ingraham v. Wright).

The doctrine of "in loco parentis" has been gradually modified in modern time, however. In the words of the United States Supreme Court in Tinker v. Des Moines Independent Community School District: "School officials do not possess absolute authority over their students. . . . Students in school as well as out of school are 'persons' under our Constitution" (p. 511). The Court was careful to note, "This Court has repeatedly emphasized the need for affirming the comprehensive authority of the states and of school officials, consistent with fundamental Constitutional safeguards, to prescribe and control conduct in the schools" (p. 507). Thus, the legality of any particular school policy

or practice involves a balance of children's rights to an education, as well as their rights as individuals, against teachers' and school administrator's duties to provide all students with a safe, orderly school environment conducive to learning (Paddock 1982, p. 371).

Student Due Process Rights

While children do not possess a fundamental right to attend public schools under the Constitution (San Antonio Independent School District v. Rodriguez), the crucial role of education in preparing children for participation in adult society has fostered the growing recognition that children have both property and liberty interests in education that may be limited only with good reason and due process.

Two recent developments have dramatically increased the application of the due process clause of the Fourteenth Amendment to cases arising from the administration of public schools. Congress and state legislatures have been increasingly willing to create or extend rights to students that may be characterized as "liberty interests" or "property interests," thus invoking the protections granted under the Fourteenth Amendment. Another important factor is the willingness of the federal judiciary to extend Fourteenth Amendment protection "to even the most trivial and inconsequential decisions of local boards of education" (McGhehey 1982, p. 133). For example in Goss v. Lopez, the Court held that a ten-day suspension from school represented a sufficient property and liberty interest requiring the extension of due process procedures consisting of oral or written notice. Also, if the charges were denied by the students, the suspension required an explanation of evidence and an opportunity for students to present their

side of the story. In summary, any sanction imposed on students for infractions against school rules must recognize students' rights to education, and penalties must not excessively interfere with students' educational progress.

Historically, handicapped people have failed to enjoy either substantial power or protection. Prior to the 1970's the handicapped, especially the mentally retarded and sense impaired, were often excluded from public schools by state statutes that precluded enrollment of children who were unable to "profit" from education (Colo. Rev. Stat.). However, in 1972, the United States District Court in Washington D.C. found that the practice of excluding students labelled as "behavioral problems, mentally retarded, emotionally disturbed, or hyperactive" has impermissibly denied them admission to public schools because the district made no provision for alternative educational placement, periodic review, or due process procedures (Mills v. Board of Education of the District of Columbia). Similarly, a federal district court in Pennsylvania found, "Having undertaken to provide a free public education to all its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training" (PARC v. Commonwealth).

PL 94-142

An overwhelming number of cases on the behalf of handicapped students eventually led to the passage of The Education for All Handicapped Children Act of 1975, widely known as PL 94-142. This law imposes even further restrictions on the right of public schools to

discipline handicapped students beyond those required for nonhandicapped students. Several aspects of the law and its implementing regulations deserve careful examination for their effect on administrative practice.

To begin with, it is noteworthy that the regulations define handicapped children as those school age children who are deemed to have certain impairments that cause them to need special education and related services. These impairments specifically include being mentally retarded, hard of hearing, deaf, speech-impaired, visually handicapped, seriously emotionally disturbed, orthopedically or otherwise health impaired, deaf-blind, multihandicapped, or being specific learning disabled. The law does not apply to children who are "socially maladjusted" unless they are included in the emotionally disturbed category.

Further, the law requires that a team consisting of appropriate school staff and persons other than district staff determine if special education placement is necessary. Parental assistance in the writing of an individualized education program (IEP) for each child who is to receive special education services is required. A child may not be placed in a special program without an IEP that describes the program and its goals in specific terms. In practice, this law extends substantial procedural rights to individuals identified as handicapped and who are in need of special programming. These safeguards have been shown to impact on the school's right to discipline students, as will be discussed later.

Perhaps the most controversial aspect of the law is the requirement that a school system give written notice to parents before it proposes

or enacts a change in the child's educational placement. The notice must be specific and indicate the reason for change. It must be accompanied by a full explanation of the procedural safeguards available to parents. Among these safeguards is included the parental right to disagree with the recommendations of the school. By filing a complaint, parents are entitled by law to a due process hearing, to the right to appeal, and to judicial review. What's more, the regulations provide that, during the pendency of any administrative or judicial proceedings, the child must remain in his or her present educational placement.

Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973, like PL 94-142, does not directly mention discipline of public school students. Under Section 504, a handicapped person is anyone with a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment. While Section 504 apparently protects students covered by PL 94-142, the definition under Section 504 appears to cover handicapped students who do not require special education services.

A significant provision of Section 504 is that it prohibits discrimination solely by reason of the handicap. This conceivably prohibits disciplinary action against a student whose improper conduct is caused solely by the handicapping condition. Schools might face a difficult situation where a student has sufficiently overcome his or her handicap to be placed in a regular classroom, negating the need for special education services. While it would appear proper to treat this student like other students in terms of discipline, improper student

conduct may be evidence that the handicapping condition was not eliminated (Ekstrand 1982).

Case Law Review

The first case to interpret the ways in which PL 94-142 affects school disciplinary practices was Stuart v. Nappi. Kathy Stuart, a third-year high school student with a history of behavioral and learning difficulties, was evaluated by the school's Planning and Placement Team (PPT). The PPT diagnosed the child as "learning disabled," requiring placement in a special education program. A psychological evaluation was recommended but not administered. Three months later, the PPT reported that she had made progress but continued to suffer from her handicap. The team recommended a psychological evaluation that was finally completed eight months later. The psychological evaluation recommended continued placement in the special education program and noted that the plaintiff's disabilities caused her frustration and humiliation at this point in her adolescence. Five months after the evaluation, she stopped attending classes. Her teacher requested that the PPT meet to determine whether Kathy's primary handicap was emotional rather than a learning disability. The PPT never met and the program was not changed.

The following school year, Kathy was assigned to a learning disabilities program. Her attendance went from poor to complete nonattendance. She began to wander through the halls and became involved in incidents that resulted in disciplinary conferences. She became involved in a schoolwide disturbance. She was given a ten-day disciplinary suspension and was scheduled to appear at a disciplinary

hearing. The school system's superintendent recommended to the board that Kathy be expelled for the remainder of the school year. Prior to the hearing, Kathy's parents submitted, as provided by law, a written request for a special education hearing to review her placement.

The court enjoined the school system from conducting the disciplinary hearing. In addition, the court acknowledged this as a case of first impression (that is, no court had, under similar circumstances, discussed the rights of students under PL 94-142 in the context of a school system's disciplinary procedures). The plaintiff's contention was that, as a student protected by PL 94-142, she was entitled to a review of her special education program. She requested the review prior to the expulsion hearing. Her argument focused on the administrative regulations that required the child to remain in her educational placement pending a proposed change. According to the plaintiff, expulsion during the pendency of her special education complaint would constitute a change of placement contrary to the regulations under PL 94-142.

The court found that, before a change of placement can take place, the regulations require prior notice to parents and provide the right to a special education hearing. Without elaboration, the court concluded that expulsion from school constituted a change in placement. The court asserted that the regulations established the requirement of a hearing and precluded change in placement pending the hearing's completion, which must be interpreted as meaning that the procedure replaces expulsion as a way of dealing with disruptive handicapped children. This ruling potentially precludes expulsion altogether, since it may

take a considerable amount of time to resolve the special education complaint.

In deciding the question of whether PL 94-142 prohibits expulsion even after complaint proceedings have terminated, the court considered the "least restrictive environment" requirement of the law, which states that handicapped children are to be educated with nonhandicapped children whenever possible and mandates that public schools must provide a continuum of alternative placements so that an appropriate but least restrictive placement will be made available to the child (Ekstrand 1982, p. 160). The court concluded that the danger existed that schools might use expulsion to circumvent the right to an education in the least restrictive environment. The court reasoned that an expulsion has the effect not only of changing a student's placement, but also of restricting the availability of required alternative placements. The court asserted that expulsion procedures followed by this district were inconsistent with those established by PL 94-142 and its regulations. Referring to the regulations, the court indicated that a child's placement is inappropriate whenever he or she becomes so disruptive that the education of other students is significantly impaired. The court stated that PL 94-142 provides for procedures whereby the disruptive student may be temporarily suspended and such suspension would not constitute a change in placement requiring change-of-placement procedures mandated in expulsion cases.

The line between expulsion and suspension is not always clear-cut. In Sherry v. New York State Education Department, Deloween Sherry, a fourteen-year-old, blind-deaf child, suffering from brain damage and an

emotional disorder rendering her self-abusive, was enrolled in The State School for the Blind in Batavia, New York. As a result of injuries from her self-abusive behavior, she was hospitalized for medical treatment. Ten days later, her mother received a letter from the superintendent of Deloween's school stating that the school did not have sufficient staff to supervise her and that return to the residential program would be impossible until her condition changed, or more staff were hired. He added that without a better student-to-staff ratio, the school could not provide the degree of supervision required to prevent Deloween from seriously hurting herself. A week later, in a meeting attended by school officials, psychologists, and Deloween's mother, the superintendent asserted that if Mrs. Sherry insisted on returning her daughter to The School for the Blind, then the school would suspend her and a suspension hearing would be provided. In the meantime, Deloween's district of residence provided a temporary program to "assist Mrs. Sherry with Deloween's behavior" (p. 1331). Shortly thereafter, the district's Committee on the Handicapped concluded that the most appropriate program available was at The School for the Blind and recommended Deloween's return on a day-only basis.

Two weeks later, Mrs. Sherry requested that her daughter be reinstated, and The School for the Blind suspended her "until it appears to be in Deloween's and the school's best interest to do so" (p. 1331).

Mrs. Sherry filed for injunctive and declaratory relief, seeking reinstatement. Shortly, the superintendent advised Mrs. Sherry that additional supervisory personnel had been authorized and the suspension would be revoked. Faced with a question of mootness, the court went

ahead with the assumption of likelihood that "the act complained of will be repeated." While the court affirmed the school's right to suspend--on an emergency basis--a handicapped student who is a danger to herself, the superintendent's letter suspending Deloween for an indefinite period constituted a change of placement, requiring procedural safeguards under PL 94-142.

The plaintiff in Sherry v. New York sought a declaratory judgment that her daughter's suspension was in violation of Section 504. The school district argued that, because the suspension was not solely by reason of her handicap, it was not an unlawful suspension. The court was quick to assert that a district is required to provide an appropriate education to all children regardless of the nature or severity of the child's handicap. Citing HEW regulations (45 C.F.R. sec. 84.33(a)) that require "related aids and services" designed to meet the needs of handicapped persons, the court ruled that the district was bound to provide adequate supervisory staff, thereby indicating that the suspension resulted from a failure of The School for the Blind to provide necessary related services. In short, the court found the indefinite suspension was an unlawful exclusion within the meaning of Section 504.

Although the case of S-1 v. Turlington failed to close the door on expulsion entirely, it reiterated the absolute necessity for school officials to adhere to the procedural requirement of PL 94-142, including the provision of educational services of some kind during expulsion. In this case, eight mild-to-moderately mentally handicapped high school students were expelled for over a year. The maximum time

allowed by Florida law is one year. The children were expelled for acts of misconduct ranging from masturbation to sexual acts against fellow students to willful defiance of authority, vandalism, and use of profane language. The plaintiffs alleged violation of their rights under both PL 94-142 and Section 504, seeking preliminary and permanent injunctive relief compelling state and local officials to provide them with educational services and procedural rights required by the above federal statutes. The court supported the earlier finding that a "termination of educational services, occasioned by an expulsion, is a change of educational placement," thereby invoking the procedural protections of PL 94-142. On the issue of whether expulsion could ever be used to discipline a handicapped student, the court found that

> expulsion is still a proper disciplinary tool, when proper procedures are utilized and under proper circumstances. We cannot, however, authorize the complete cessation of educational services during an expulsion period. (p. 348)

Similarly, an Indiana district court found in Doe v. Koger that schools are prohibited from expelling students whose handicap causes them to be disruptive, but are allowed to transfer disruptive students to an appropriate, more restrictive environment. However, the court asserted that expulsion of a handicapped child from school under the same disciplinary regulations as other students did not in itself constitute a denial of Fourteenth Amendment equal protection rights.

There is little case law to suggest the ways in which PL 94-142 might protect students facing temporary suspension. The only case to consider this issue held that change of placement procedures were not necessary before short term suspensions. In Board of Education of the City of Peoria School District 150 v. Illinois State Board of Education,

the federal court heard the school district's appeal from a decision by the state education superintendent stating that short-term suspensions were equivalent to a change of placement. A handicapped student had been suspended for five days for swearing at a teacher. This conduct was found to be unrelated to his handicap. The court held that a short term suspension was not equivalent to a change of placement. Somewhat fallacious reasoning on the part of the court analogized brief periods of enforced absence as "possibly equivalent to that often caused by a common cold," neglecting to realize that one results in a disciplinary record while the other does not (Paddock 1982). In addition, the Peoria court failed to consider that a properly drawn IEP would contain explicit provisions for alternative instructional services during any absence occasioned by actions of school officials, especially in cases where a high probability of disruptive behavior exists.

One of the most recent cases (Kaelin v. Grubbs) to affirm the procedural protections of PL 94-142 involved a fifteen-year-old educable mentally handicapped student who "defied his teacher and kicked and hit him." The next day the student was suspended, and later the school board voted to expel him for the remainder of the school year. After the superintendent of schools denied the student's request for a due process hearing, a complaint was filed in federal district court by the parents. The lower court held that the student's expulsion constituted a change of placement and that the district erred by not providing him with due process required under PL 94-142. In upholding the lower court decision, the Sixth Circuit endorsed several previously cited decisions.

Consistent with the philosophy of many school officials, the

district unsuccessfully argued that the above cases created a double standard for student conduct. The district asserted that "handicapped children will be entitled to commit disruptive acts with impunity while a non-handicapped child would be punished for the same action." The court's response attempted to strike a balance between the special educational needs of handicapped children and the need of school officials to discipline disruptive children:

> A handicapped child is not totally immunized from disciplinary action by (PL 94-142), Section 504, or supporting case law. . . . A handicapped child may be suspended temporarily without employing the procedures of (PL 94-142). . . . (A)s long as the procedural protections of PL 94-142 are followed, a handicapped child may be expelled in appropriate circumstances. . . . A handicapped child may not be expelled, however, if his disruptive behavior was a manifestation of his handicap. . . . Moreover, even during the expulsion period, there may not be a complete cessation of educational planning for handicapped children. This concept would be eviscerated if school officials could expell handicapped children using traditional expulsion procedures.

While it must be kept in mind that these cases are law only within their respective jurisdictions, they provide guidance for the formation and implementation of policy and practice with regard to disciplining handicapped students. Briefly summarized, the following generalizations can be made:

- Expulsion, beyond emergency removal, involving a full cessation of instructional services, is almost certainly impermissible in the case of handicapped students.
- Schools are well advised to develop a wide range of options--not including a complete cessation of instructional services--to employ with dangerous or disruptive handicapped students.

- The question of whether or not the behavior is related to the handicapping condition must be addressed by qualified personnel including those closest to or most knowledgeable about the child prior to lengthy or frequent suspensions or expulsion.
- A series of frequent, short suspensions signals inappropriate placement or a need for alternative procedures that will ensure the provision of instruction to the disruptive student, in the least restrictive environment.

Absence of Clear Federal Guidelines

The lack of federal leadership in the crucial area of disciplinary practices is typified by recent efforts to amend PL 94-142's regulatory guidelines. Seeking to "resolve the recurring question of the relationship between tne requirement of a free appropriate public education and a school's ordinary disciplinary procedures" (Federal Register Vol. 47, No. 150), the Education Department in August 1982 proposed amendments that contained a section specifically addressing disciplinary rules and procedures (sec. 300.114) that would have allowed schools to discipline handicapped students using "normal" disciplinary standards and procedures. The proposed amendments stated:

> (a) A policy which ensures that all handicapped students have the right to a free appropriate public education, as required by sec. 300.110, is not violated by disciplinary procedures described in this section. However, nothing in this section may be read to affect any additional due process requirements imposed by disciplinary procedures.
>
> (b) A public agency may use imposition procedures applicable to nonhandicapped children for the imposition of a disciplinary sanction on a handicapped child where a hearing is not required by law or agency policy.

(c)(1) Before imposing a disciplinary sanction on a handicapped child where a hearing is required by law or agency policy, the agency shall determine, in accordance with procedures the agency considers appropriate, whether the child's behavior was caused by the child's handicapping condition. The agency may make this determination before, at, or after the hearing required by law or agency policy. In making this determination, the agency shall involve persons who are familiar with the child and with the behaviors associated with the handicapping condition.

(c)(2) If the agency determines that the child's behavior was caused by the child's handicapping condition, the procedural safeguards in sec. 300.[illegible]5-300.154 apply to any agency action described in sec. 300.145(a) regarding the child.

(c)(3) If the agency determines that the child's behavior was not caused by the child's handicapping condition, the agency may impose a disciplinary sanction on the child using procedures applicable to nonhandicapping children.

(d) The agency shall ensure that its disciplinary standards and procedures are applied in a way that does not discriminate against handicapped children.

Briefly summarized, the proposed amendments would have precluded schools from imposing on a handicapped student "a disciplinary sanction that requires a hearing by law or agency policy before determining that the child's behavior was not caused by the child's handicapping condition." An agency would be permitted the flexibility to address the sensitive question of the relationship between the handicapping condition and the behavior in either its normal hearing or in a separate proceeding. An agency would have been permitted to address the question before, at, or after the normal hearing, as the circumstances of the case dictate. Persons familiar with the child and the child's handicapping condition would have been required to be involved in the determination of relationship.

The well-intended amendments would likely have created more

problems than they could potentially have solved in light of the practical difficulty schools experience in determining whether a child's behavior is caused by the handicapping condition. The regulations might have reduced the number of unilateral actions taken by school administrators against handicapped students, however. The proposed amendments were not adopted, and school officials must continue to operate amidst a lack of state or federal guidelines upon which to base their actions.

Disciplinary Practices in Oregon

Thus far, Oregon public school disciplinary practices involving handicapped students have escaped litigation. This does not mean that the threat of such action does not exist. Howard Smith, Oregon Department of Education (ODE) specialist for learning disabilities, indicates that ODE frequently receives questions and complaints from parents, school officials, and advocacy groups concerning disciplinary actions against handicapped students.

In a recent interview, Smith said, "Just this week we had two calls. . . . where there were unilateral actions on suspension leading to expulsion. The school disciplinary officers took action without having contacted special education personnel." Smith laments, "In a number of cases many of the school officials are not knowledgeable about discipline requirements under PL 94-142 and Section 504 of the Rehabilitation Act. They are applying usual discipline procedures, and in some cases the school officials do not follow their own district policy or state administrative rules."

Oregon Statutes and Administrative Rules

Under state law (ORS 339.250 (3)), "The district school board may authorize the discipline, suspension, or expulsion of any refractory pupil." Subsection 4 provides the bases for such disciplinary action: "Willful disobedience, open defiance of a teacher's authority, or the use of profane or obscene language is sufficient cause for discipline, suspension, or expulsion from school." Subsection 6 provides the statutory mechanism for the provision of alternative placement in the

event of frequent or serious disciplinary action:

> When a pupil is expelled pursuant to subsection (3) of this section, or following a second or subsequent occurrence within any three-year period of a severe disciplinary problem with a pupil, or when it has been determined that a student's attendance pattern is so erratic that the student is not benefitting from the educational program, a district school board shall consider and propose to the pupil prior to expulsion and documentation to the parent, legal guardian or person in parental relationship alternative programs of instruction or instruction combined with counseling for the pupil.

Administrative regulations (OAR) 581-21-065 and 581-21-070 elaborate on the required procedures for suspension and expulsion respectively. Chapter 581, Division 15 of the Oregon Administrative Rules provides the guidelines for special education programs and services in the state. Under these regulations a child identified as "seriously emotionally disturbed" qualifies for the provisions and protections of state special education law. The regulations (OAR 581-15-005 (h)) define <u>serious emotional disturbance</u> as

> an emotional problem which affects a child's educational performance to the extent that the child cannot make satisfactory progress in the regular school. The seriously emotionally disturbed child exhibits one or more of the following characteristics over an extended period of time and to a marked degree.
>
> > (A) An inability to learn at a rate commensurate with the child's intellectual, sensory-motor, and physical development;
> >
> > (B) An inability to establish or maintain satisfactory interpersonal relationships with peers, parents or teachers;
> >
> > (C) Inappropriate types of behavior or feelings under normal circumstances;
> >
> > (D) A variety of excessive behaviors ranging from hyperactive, impulsive responses to depression and withdrawal; or

(E) A tendency to develop physical symptoms, pains, or fears associated with personal, social, or school problems.

This is a broad definition of emotional disturbance, and potentially one that might be used to include almost any child whose behavior necessitates repeated disciplinary action. It is not difficult to understand why school officials find this area so filled with questions and possible problems.

According to Smith, many of the problems that have occurred have arisen where school officials in charge of student discipline are not knowledgeable of special education requirements. He adds, "I think most of the special education people and many superintendents are knowledgeable, for instance, of the fact that the relationship must be established whether the behavior was a result of the handicapping condition, and that kind of thing."

Pat Ellis, Oregon Department of Education assistant superintendent for special education, told me in an interview that she has received numerous calls from local school officials prior to direct action, checking to see if they are "doing it right, or seeing if there is a problem." Smith and Ellis emphasized that consulting with school officials in the area of disciplinary practices and procedures is not easy since individual cases often differ in important ways, and because of a lack of current federal guidelines in this area. While no formal state statutes, policies, or guidelines specifically address the discipline of handicapped students, the State Department of Education provides technical assistance to districts facing such situations.

The Advocacy Center's View: A Serious Problem

The Oregon Developmental Disabilities Advocacy Center (ODDAC), located in Portland, is one of a national network of such centers established by Congress under the Developmentally Disabled Assistance and Bill of Rights Act (PL 94-103) to protect people who are developmentally disabled. ODDAC is a private, nonprofit corporation--independent of any state agency that provides treatment or habilitation services--and has the authority to pursue legal, administrative, and other remedies to ensure the protection of the rights of disabled persons. I contacted ODDAC to learn the extent to which they receive calls concerning disciplinary actions against handicapped students.

It's a very serious problem in the state, declared Suzy Harris, ODDAC legal intern and University of Oregon graduate in special education. "Many school administrators just do not know the procedures that have to be followed with handicapped children," she said. Harris continued:

> Typically the problem arises with emotionally disturbed kid-, but it also arises with learning disabled (LD) children. Even in sophisticated districts, there is still a misconception that the special procedures only apply if the child is emotionally disturbed; that the special procedures do not apply to a child with learning disabilities.

To emphasize her point, Harris showed me a copy of one district's regulations. Under "Expulsion of Handicapped Students" is the following statement:

> Handicapped students are subject to disciplinary action in much the same way as non-handicapped students. The exception may be when disciplinary problems of a handicapped student relate directly to his/her handicap and the student is considered for expulsion, in which case special procedures may need to be followed.
>
> These procedures need to be followed only in cases of

emotionally handicapped students or other handicapped students with emotional involvement. . . .

Harris then described a recent case that exemplifies the manner in which she felt school officials often fail to adhere to provisions of federal law:

> An LD child who was mainstreamed except for one period in the resource room was suspended for smoking pot on the school grounds, or being with kids who were smoking pot. The school suspended him and requested an expulsion hearing. The parents contacted us (ODDAC) and I called the school principal. I asked him if he had followed the procedures required for the discipline of handicapped students. He replied, "(The child's) handicapping condition doesn't have anything to do with his behavior, and I have already decided that." I told him that it was a decision not to be made unilaterally by him, but by a team of people. He replied, "No problem." He asked me who should be there and so forth. He called the meeting; he had the parents and the school counselor there, but he did not have the special education teacher there. That was it. The counselor said, "Obviously it's not related," and they scheduled the expulsion hearing for the next day. I contacted the school's attorney. His reaction was that same misconception, that because the child is not emotionally disturbed, there is probably no relationship.

I asked Harris to suggest the ways in which such an incident could be shown to relate to the handicapping condition.

"I think you could argue that it is harder for a learning disabled person to process the consequences of their behavior. Secondly, the need for peer acceptance is greater, and so a child might resort to inappropriate behavior in order to gain peer approval." She was quick to add, "But in any case, the school didn't even make a good faith assessment of the possible relationship." Harris recommends that when considering a disciplinary action against a handicapped student the school should consult with the special education director or at least the special education teacher. "They should know what needs to be done," she asserts.

Harris emphasized that each case should be treated individually and that those closest to the child--the parents, teachers, and others who work with the child on a day-to-day basis--are in the best position to make that determination.

Example of One School District

In order to gain a clearer perspective on how issues surrounding the discipline of handicapped children are perceived at the local level, I interviewed David Piercy, director of special education for the Eugene 4-J School District. On the topic of communication between school site administrators and district level special education personnel, Piercy declares that district policy requires that he be informed of all expulsion cases involving indentified handicapped students. Piercy indicated, however, that he is not routinely informed of all suspensions involving such students.

He commented, "In all cases, I don't view that as a problem. . . . In fact, if it's for routine disciplinary procedures and the frequency of occurrences is once or twice per year for two or three days, I don't view that as a problem."

In cases where handicapped children are being suspended repeatedly, Piercy indicates that he is notified via school personnel or the child's case manager. "Case managers are extremely cautious about suspensions and expulsion, particularly if it involves an identified emotionally handicapped student, or if it's occurring over an extended period," he said.

When asked about the impact of federal and state handicapped laws on the actions of school administrators as a whole, Piercy stated:

There is fear among school administrators that they can't legally discipline handicapped students. They are fearful of suspending handicapped students. It used to be common practice that a lot of kids that are now in special education were routinely suspended. . . . If you have a child who requires one or two days of suspension all year that doesn't bother me at all. It disrupts their education, but I believe the bulk of identified handicapped students have to live within the same rules as everybody else and I believe suspension is a legitimate natural consequence.

If you have a youngster who has repeated behavioral difficulties and it's real clear that there is a strong relationship between the youngster's behavior and the handicap, I think that it's totally inappropriate for us to suspend for any length of time. The hard thing is all the kids in the middle. When does the behavior relate to the handicapping disability? What is the nature of the relationship? Those are the problems.

When asked how useful it is for districts to develop a range of options for dealing with handicapped students with chronic behavioral problems, Piercy suggested that districts develop the means by which a range of options may be considered:

I think your options ought to be of two kinds, process options and the actual things you can do with students. It's important that you not just go to options, but that you have a process for getting to those options. In fact, through process you can make-up options that process leads them to, but the options should not be inflexible in themselves. For instance, if you have an option of home-instruction, you may change how that's used on an annual basis, depending upon the kids you have. Even the special education program that you have may change from year to year, based on whatever the current needs in the school district are.

Since I have been with this district, we've changed the kinds of services that are delivered to kids annually, based on needs of kids. The kids that we change services for are primarily behavioral problem kids. This might include changing what a given specialist does, changing the focus of a given self-contained special education class, or expanding the focus of a given program so that it accommodates the needs of youngsters.

Guidance on Relationship between Behavior and Handicap

For guidance in the obviously troublesome process of determining if a relationship exists between a handicapped child's behavior and the handicap, I sought the opinion of one of Oregon's most widely recognized authorities in the area of special education law, Judith Tegger. Currently assistant attorney general and formerly a consultant to the Oregon School Boards Association, Tegger indicated that in both her previous position and in her current one she has received many calls from school officials for information and consultation regarding the area of special education laws. She willingly provided me with some insightful observations and useful recommendations:

> I was hearing from school administrators, "Does this mean that if kids are identified as handicapped that we have to let them run wild?" What the law says is that if a child who is identified as handicapped is having behavioral problems, you have to determine if there is a connection between the behavior and the handicapping condition and then do something appropriate. . . . When I taught workshops on this topic I would ask them what they would do with a perfectly normal child, a seventh grade boy who writes uncomplimentary remarks about a teacher on the lockers with spray paint. Would you call the parents? Would you look at how the child is doing in school generally? If it reflected a lot of anger, bitterness, and frustration, and he's flunking a lot of classes, would you consider what to do about fixing up his school program?
>
> What you would have to do about handicapped kids is not terribly different, but you have to be more explicit about it and make a paper trail. In fact, what you need to do is to evaluate the relationship and the rules that go along with that; involve the parents; do some planning of a problem that takes in all the needs of the child, not just the isolated incident. . . . I personally think that's the way that good discipline programs are run. Discipline is not whacking a kid over the head. Discipline is saying to the child, "You've got a problem with your behavior." In the whole context we want to help him learn how to do things in a way that will teach him to get along OK in society. And that's true for a handicapped or a nonhandicapped child.

Tegger's suggestions regarding the process required to determine whether a relationship between the behavior and the handicapping

condition exists reinforced the views of those I had previously interviewed:

> The determination of the relationship between the handicap and the behavior has to be made by qualified people. . . . A school would be wise to have a policy that says, when we're going to suspend a child who has been identified as handicapped, as a minimum the teacher who is delivering the special education services will be consulted as to the existence of the relationship.

Suggested Guidelines

Both Smith and Ellis of the Oregon Department of Education, Special Education Division assert that there is a strong likelihood that disruptive behavior on the part of handicapped students can be associated with the handicapping condition in many cases, thus potentially precluding exclusion from school services under both Section 504 and PL 94-142. "You just have to look at the statistics of the high number of learning disabled students in juvenile corrections programs," asserts Ellis, "to have at least a feeling that there is some strong linkage there between discipline problems and learning disabilities."

Ellis and Smith provide the following suggestions in cases of expulsion or repeated suspensions of handicapped students:

- Be very cautious about the use of suspension with handicapped students, especially if the behavior can be shown to relate to the handicapping condition.
- If a child is experiencing reoccurring behavior or compliance problems, take steps to determine if the IEP is appropriate or if it needs to be revised to address the child's behavioral needs and possibly include procedures to be implemented in the event of disruptive outbursts or other forms of unacceptable

conduct.

- Call together the multidisciplinary team to determine if further assessment is advisable.
- Instructional services of some kind must be continuously provided in the case of repeated suspensions or expulsion.
- Call for a new IEP prior to expulsion from school placement.

Conclusion

The past decade has witnessed a dramatic expansion of rights afforded handicapped students. PL 94-142 and Section 504 grant to students services and protections that may not be limited by school officials without proper precautions. The view of those most knowledgeable of special education law is that school site administrators need to be better informed about the requirements of both state and federal statutory and case law.

It is generally agreed that handicapped students may be suspended for short, infrequent periods. Frequent suspensions and expulsions almost certainly require an IEP meeting to determine the relationship between student behavior and the handicapping condition, as well as change of placement procedures. Such a meeting should include those most knowledgeable of the child--the parents and teachers. Identified emotionally disturbed students are not the only ones who qualify for such protection in situations of inappropriate or disruptive behavior. In cases where disruptive behavior is likely, IEPs should address the problem, specifying the manner in which inappropriate behavior will be treated.

While the legal requirements for disciplining handicapped students do not differ greatly from those required for all students, procedural requirements must be adhered to, especially the documentation of school actions that restrict or limit the delivery of educational services to any identified handicapped student.

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